87-2118

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ AND WENCESLAO GUTIERREZ, JR.,
Appellants

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, Victoria Independent School District; and VAL HUVAR, County Clerk, County of Victoria,
Appellees

On Appeal From the United States District Court of the Southern District of Texas

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JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALEXANDER M. ROJAS, ET AL.,

Appellants

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellees

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Whether the district court improperly denied declaratory and injunctive relief under Section 5 of the Voting Rights Act in finding that a legislative change in local policy governing the agenda preparation for Board meetings which grants one member of the Board as President discretionary powers to subject remaining Board members to an

arbitrary limitation of their individual powers and duties as elected representatives from both single-member district and at-large positions, in contravention of state law and state policy, was not a change affecting voting within the scope of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

2. Whether the district court improperly denied declaratory and injunctive relief under §5 of the Voting Rights Act, 42 U.S.C. §1973c,1 in finding that the challenged policy change was not within the scope of the Act because it was racially neutral and had never been applied even though the court found that the policy has potential for discriminatory application.

LIST OF ALL PARTIES INVOLVED

The caption of the case in this Court contains the names of all parties involved in this proceeding.

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OPINION BELOW

The opinion by the lower court remains unreported. The lower court's opinion and Judgment are appended hereto.

STATEMENT OF JURISDICTIONAL GROUNDS

Appellants, Alexander M. Rojas, Theresa Gutierrez, Ruben Caraveo, Terri Perez and Wenceslao Gutierrez, Jr., bring this appeal from a Judgment of the United States District Court for the Southern District of Texas, Victoria Division, denying Appellants' request for declaratory judgment that the change in the school district's agenda preparation policy embodied in policy BE (LOCAL) is a change affecting voting subject to requirements of §5 of the Voting Rights Act of 1965, 79 Stat. 439 (1965) as amended, 89 Stat. 402, 42 U.S.C. §1973c (Supp.1981), and injunctive relief as to the implementation of that policy. The Judgment was entered on March 29, 1988, by the

United States District Court for the Southern District of Texas, Victoria Division, sitting as a three-judge court under the requirements of 42 U.S.C. §1973c, as amended. On April 27, 1988, Appellants filed in that court a Notice of Appeal, a copy of which is attached hereto. (See Appendix p.10a). Jurisdiction is vested in this Court under the Voting Rights Act of 1965, 42 U.S.C. §1973c (Supp.1981).

Appellants submit that this Court has jurisdiction over the questions on appeal since said statute provides for direct appeal to this Court. The questions on appeal are of such a substantial nature as to require plenary consideration by this Court.

STATUTORY AUTHORITIES

Voting Rights Act. 42 U.S.C. §1973c(1975):

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in Section 1973b(a) of this title based upon determinations under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or

whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure:

Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may

reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

STATEMENT OF THE CASE

A. Facts Material to Case

Victoria Independent School District, under the laws of the State of Texas, is governed by a seven member Board of Trustees. Prior to February 14, 1985, Victoria Independent School District maintained an at-large system of elections featuring numbered places and staggered terms of office for all positions. A change in election systems was undertaken in early 1984 pursuant to new state law enacted in 1983, to avoid the possibility of litigation. United States v. Victoria Independent School District, No. V-86-17 (S.D. Tex. November 14, 1986.) [1] At public hearings on the election

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[1] Prior to August 29, 1983, state law applicable to most Texas school districts required at-large elections. In its first session following the 1982 amendment of the voting Rights Act, the Texas legislature enacted a new law permitting 70% or more

(Footnote Continued)

system, the Mexican American community had strongly opposed inclusion of any at-large positions and inclusion of any restrictive features for at-large positions. On February 14, 1985, Victoria Independent School District received preclearance for the implementation of a new election system which incorporated five single-member districts and two at-large positions. Thereafter, on April 5, 1985, elections were held under the new system for all positions. A numbered place requirement for the at-large positions, not part of the precleared plan, was implemented.

As a result of the elections, Theresa Gutierrez, was elected as the only Mexican American on the Board, from a single-member district with a 51.4% Hispanic population and a 14% Black population. No other Mexican American has subsequently

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(Footnote Continued)
of the trustees to be elected by single-member districts. Tex. Educ. Code Ann. tit. 2, §23.024 (Vernon) (1987)

been elected to the Board. No other female served on the Board during the period of April 1985 through April 1987.

After efforts to secure the submission of the numbered place feature, the United States of America filed suit against Victoria Independent School District in April of 1986, to enforce Section 5 of the Voting Rights Act as to the numbered place requirement.

During the pendency of the action filed by the United States, a group of Mexican American individuals, including three of the Plaintiffs before this Court as Appellants, requested Plaintiff-Intervenor status on behalf of the Mexican American voters. The group was granted amicus curiae status for briefing and oral argument. The three individuals included Alexander M. Rojas and Terri Perez, close associates of Mrs. Gutierrez, and Wenceslao Gutierrez, Jr., Mrs. Gutierrez' husband.

Six days after the court's decision against the district in United States v. Victoria Independent

School District, No. V-86-17 (S.D. Tex. November 14, 1986), on November 20, 1986, the Board of Trustees on a six to one vote adopted policy BE (LOCAL) which provided that depending on the nature of the items submitted the President of the Board may require approval of two Board members to secure placement of an item on the Board agenda. Mrs. Gutierrez voted against the policy.

Prior policies followed by the Board were developed by the Texas Association of School Boards and allowed any member of the Board to request an item be placed on the agenda for the open business meetings of the Board. The policy initially proposed for adoption required any two members of the Board request that an item be placed on the agenda for Board meetings.

On February 27, 1987, the Department of Justice notified the school district that the policy change requiring two members of the Board to request an item be placed on the agenda for Board meetings should be submitted for preclearance. The

Department explained that in the context of the newly effective single-member district plan, the change in policy had a significant impact on the nature and character of the representation that voters could expect from their individually elected representative. (Appendix pp. 14a-15a)

The school district responded on March 10, 1987, that the Department had received erroneous information on the policy actually adopted, and did not submit for preclearance the policy for agenda preparation actually adopted on November 20, 1986. Subsequently on March 23, 1987, Mexican American plaintiffs filed this action for declaratory and injunctive relief under Section 5 of the Voting Rights Act as to the school district's change in policy for agenda preparation and as to the use of ballot language of instruction to voters ("Vote for Two") which effectuated an anti-single shot voting requirement in the court-ordered special election for

at-large positions on the Board. [2] The proceedings of this action are primarily depicted through the documents filed by the parties in the action. In accordance with an order of the district court, parties filed briefs and stipulations of facts relevant to the questions presented. By order of the district court, discovery was restricted. In lieu of an evidentiary hearing the district court provided an opportunity for oral argument following the culmination of the briefing schedule in the case. At oral argument, Plaintiffs sought and secured admission of additional evidence in the record. Through briefs filed and in subsequent oral argument, Plaintiffs/ Appellants raised questions for which they now seek review.

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[2] The ballot language portion of this lawsuit was severed and joined with the earlier action filed by the United States against Victoria Independent School District, United States v. Victoria Independent School District, Civil Action No. V-86-17, by order of the district court on March 31, 1987.

B. Opinion of Lower Court

The question before the three-judge court was whether §5 preclearance review of policy BE(LOCAL) is required. The lower court primarily focused on the subsumed question of whether the change in Board policy for agenda preparation was a change "affecting voting," and briefly on whether the change was discriminatory. Opinion pp. 2,4, Rojas v. Victoria Independent School District, No. V-87-16 (S.D. Tex. March 29, 1988)(See Appendix pp.3a,5a-6a) (hereinafter cited as Rojas v. Victoria I.S.D.) The unanimous opinion found that the modifications of powers of trustees effectuated by the policy were inconsequential and beyond the scope of §5. It further found that the powers of board members exist only in the context of the board as a collective body and that the minor alteration of procedure effected by the policy did not impact on the manner in which the board reaches collective decisions. The lower court also

determined that the change did not single out Trustee Gutierrez and had not been applied to her disadvantage, but that discriminatory application would be subject to legal challenge.

The district court first determined that the challenged policy was beyond the actual election process itself and beyond the examples listed by the Attorney General at 28 C.F.R. §51.13. The court also concluded that under Hardy v. Wallace, 605 F.Supp. 174 (N.D. Ala. 1985), routine legislative modification of duties or authority of elected officials were beyond the scope of §5. Therefore, the "miniscule" effect of the policy change on the powers of Victoria trustees the court found was beyond the farthest reaches of the scope of §5. Opin. p.2, Rojas v. Victoria I.S.D., No. V-87-16 (S.D. Tex. March 29, 1988) (Appendix p.4a). [3]

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[3]State policy requires and previous board policy allowed all individual members of the governing body to have equal authority in development of public business meeting agendas.

The court below then disposed of the question of the effect of the policy on powers of trustees by determining that any such power exists only in the context of the board acting as a collective body. This approach required the Court to focus only on the effect of the change in the context of collective actions by the board when constituted as a body. Thus, the court concluded that "only a significant alteration of parliamentary procedure could effect the manner in which [the board] comes to its collective decision." Opin. p. 3, Rojas v. Victoria I.S.D., No. V-87-16 (March 29, 1988) (Appendix p.4a). The procedural change effected by the policy was of "de minimis import," merely advancing the time for a second before bringing the issue to the board, similar to requirements of standard parliamentary procedure. [4] Opin. p.3, Rojas v.

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[4]The record below contains minutes of board meetings for April 1985 - July 1987, showing that a very modified parliamentary procedure under which (Footnote Continued)

Victoria I.S.D., No. V-87-16 (March 29, 1988) (Appendix p.4a-5a).

The lower court concluded that the policy was not directed to Trustee Gutierrez because any board member could be affected by the policy and it had never been applied to her disadvantage. Furthermore, the court found the ability of Trustee Gutierrez to procure a second for or succeed in an action before the collective body was in no way affected. Therefore, although also finding that discriminatory application of the policy was possible and would be legally challengeable, the court concluded that the Voting Rights Act was not concerned with matters like policy BE(LOCAL).

(Footnote Continued)
discussion or debate on an agenda subject may supercede a motion on the matter is used in conducting business. The Texas Open Meetings Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17, Sec. 3A(a). (Vernon) (1988 Supp.), the controlling authority for conduct of business by a governing body, limits any discussion, deliberation or decision of the body to the subjects listed in the notice to the public of the agenda for a public meeting.

SUBSTANTIALITY OF QUESTIONS PRESENTED

The questions presented are so substantial as to require plenary consideration.

A. The starting point for analysis of the Victoria school district agenda preparation policy, BE(LOCAL), is the historical development of the judicial interpretation of the scope of §5 of the Voting Rights Act, "to determine whether in light of articulated purposes of the legislation, Congress intended that the statute apply to the particular case in question." Allen v. State Board of Elections, 393 U.S. 544, 570, 89 S.Ct. 817, 834, 22 L.Fd 1,20 (1969).

Beginning with State of South Carolina v. Katzenbach, 383 U.S. 301, 334-355, 86 S.Ct. 803, 822, 15 L.Ed 769, 790 (1966), which upheld the constitutionality of the Voting Rights Act, the Supreme Court early on recognized and affirmed the intentions of Congress, based on historical experience, to enact an exceptional, broad

legislative measure through §5 that would continually evolve to address the extraordinary stratagems states might develop to evade the remedies to voting discrimination contained in the Act or imposed by the federal courts.

Subsequently, in Allen v. State Board of Elections, the Supreme Court's first decision construing Section 5, it examined the legislative history of the Act and concluded the intentions of Congress were that §5 be given the "broadest possible scope." Allen, supra, 393 U. S. at 567, 89 S.Ct. at 832, 22 L.Ed.2d. at 17-18. The Court concluded further that Congress intended for the act to respond to "the subtle as well as the obvious state regulations which have the effect of denying citizens the right to vote." Allen, supra, 393 U.S. at 565, 89 S.Ct. at 831-832, 22 L.Ed.2d at 17. "[T]he Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' 79 Stat. 445, 42 U.S.C. §1973l(c)(1) (1964 ed., Supp. I). See

Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964)." Id. In his separate opinion, Justice Harlan confirmed the Court's position, by stating of the opinion,

> The Court, however, goes further to hold that a State covered by the Act must submit for federal approval all those laws that could arguably have an impact on Negro voting power, even though the manner in which the election is conducted remains unchanged.

Allen, supra, 393 U. S. at 583, 89 S.Ct. at 840, 22 L.Ed.2d at 27. Concurrently with Allen, the Supreme Court observed in Fairley v. Patterson, 393 U.S. 544, 569, 89 S.Ct. 817, 833, 22 L.Ed. 2d 1, 18 (1969), that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."

In the subsequent cases of Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971) and United States v. Board of Commissioners, 435 U.S. 110, 78 S.Ct. 965, 55 L.Ed.2d 148 (1978), the Court reexamined and confirmed its prior decisions that comprehensive

coverage of §5 was intended by Congress as protection against dilution of voting power.

As the court concluded in Dougherty County Board of Education v. White, 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed. 2d 269 (1978), the reenactment of §5 by Congress in 1970 and 1975 without substantial modification, although considering both Allen and Perkins extensively, clearly demonstrated approval of the broad construction given §5 by the Court. More recently the Supreme Court concluded that Congress again specifically endorsed the broad interpretation of §5 when it extended the Voting Rights Act in 1982. NAACP v. Hampton County Election Com'n., 470 U.S. 166, 176, 105 S.Ct. 1128, 1134, 84 L.Ed.2d 124, 133 (1985). The judicial precedent of §5 interpretation clearly establishes that effectuation of the purposes of the Act will continue to include within the scope new, unparalleled changes which when analyzed in the context of the specific facts may have potential for adverse impact on voters. See, NAACP, supra, 470

U.S. at 176-177, 105 S.Ct. at 1134-1135, 84 L.Ed.2d 133-134. See also, 470 U.S. at 176, n.21, 105 S.Ct. 1134, n. 21, 84 L.Ed.2d at 134, n.21.

The district court's conclusion that the change in the agenda preparation policy was not a discriminatory change within the purview of §5 runs counter to the intentions of Congress as has been repeatedly affirmed by the Supreme Court. The clear principle that has emerged from Allen and its progeny as to the coverage scope of §5 is that the key inquiry is whether a challenged change is one affecting the power of voters. The lower court did not address the effects of the change in the agenda preparation policy in terms of its impact on voters, vis a vis the effectiveness of representation provided voters by trustees. Rather, the court addressed its impact on the powers of trustees under the limited scope of their ability to accomplish collective action under standard parliamentary procedure.

The three-judge court first states that the change in policy is outside examples listed in the regulations developed by the Attorney General and the election process itself. Then apparently concluding the policy change was a routine modification of power, the court relied on Hardy v. Wallace, supra, 603 F.Supp. at 179, to conclude that "routine or ordinary legislative modification of the duties or authority of elected officials," is probably beyond the reach of §5 "even given its broadest interpretation." Opin., p. 2. Rojas v. Victoria I.S.D., No. V-87-16 (S.D. Tex. March 29, 1988 (Appendix p.3a).

The approach taken by the district court in examination of the facts of this case and, thus, conclusions reached run completely counter to the holdings in Hardy and the purposes of §5. The court in Hardy v. Wallace determined under guidance of Allen and its progeny that the relevant attribute of the change was its effect on voters. Supra, 603 F.Supp. at 178. Therefore, the Hardy

court examined the legislated change in authority for the appointment of members to the county racing commission from the legislative delegation to the governor in terms of the effect on the power of county voters and their effective representation, not its impact on the legislative delegation alone. Similarly, the relevant attribute of the change in the agenda preparation policy is its effect on the power of voters and the effectiveness of representation provided to voters, particularly of single-member districts. Unlike the Hardy court, the district court here reviewed in a vacuum the impact of the change on trustees. The lower court's inquiry should not have stopped with an examination of the modification of the powers of trustees functioning as members of a collective body to reach collective decisions under standard parliamentary procedure strictures, but should have examined the modification with respect to the powers of trustees in terms of their ability to

function as effective representatives for voters.[5]

In the context of the actual procedural process used in conducting business by the Victoria school board, the effectiveness of representation provided voters from single-member districts is substantially compromised by a policy that may allow an elected representative to address issues of direct concern to his/her constituents only with the approval of another member elected by a totally different constituency. Additionally the power of voters, from single-member districts particularly, is diluted when one member of a seven member board, elected by different constituencies, is granted a discretionary power to virtually control what issues of interest will be presented in public board meetings. Such a policy has the potential to completely thwart

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[5]As noted supra at n.4, the Victoria school board does not conduct business under standard parliamentary procedure. Therefore, conclusions of the lower court based on the assumed use of that process are not supported by the record, and are, in fact, contrary to the record.

the purpose for which single-member districts are traditionally implemented, that of providing effective representation to segments of a community, in particular minority communities. Clearly, under the historical and peculiar facts of this case the court should have found that the challenged policy is a change affecting voters within the scope of §5.

The district court's determination that the policy change did not trigger §5 application repeatedly emphasized the inconsequential nature of the change. The court concluded in separate sections of its opinion that the policy change had a "miniscule" effect on the powers of trustees and that the procedural change effectuated by the policy was one of "de minimis import." Opin.pp. 2,3, Rojas v. Victoria I.S.D., No. V-87-16, (S.D. Tex. March 29, 1988)(See Appendix pp.4a,5a).

The district court's characterization of the change in diminutive terms does not operate to exclude the change from §5 application. In Allen, the Supreme Court specifically found all changes no

matter how small were intended by Congress to "be subjected to §5 scrutiny." Allen, supra, 393 U.S. at 568, 89 S.Ct. at 833, 22 L.Ed 2d at 19; NAACP, supra 470 U.S. at 175-176, 105 S.Ct. at 1136, 84 L.Ed.2d 132. (1985).

The holding by the Court below demonstrates the need for a reaffirmation of the clear message of the federal courts and Congress that §5 be given the broadest possible scope in order to combat new and subtle subterfuges to voting power. While not a standard §5 change, the agenda preparation policy for Victoria school district has a very real effect on the power of the voters, particularly those from single-member districts, substantially diluting the effectiveness of their representation and thus their power. The district court has made a fundamental error in finding that the policy is not a change affecting voting within the scope of §5 and that no preclearance is required.

B. The conclusions of the court below that policy BE (LOCAL) is outside the application of §5

because the policy is facially neutral and has never been applied to Trustee Gutierrez' disadvantage runs counter to the Supreme Court's holding in NAACP. It is not within the purview of this district court to determine whether the changes at issue "in fact resulted in impairment of the right to vote, or whether they were intended to have that effect." NAACP, supra, 470 U.S. at 181, 105 S.Ct. at 1137, 84 L.Ed.2d at 136. That determination is "reserved by statute to Attorney General or to the District Court of the District of Columbia." Id. The inquiry of the Rojas court was limited to whether the "challenged alteration has the potential for discrimination." Id.

The district court very clearly recognized that the change in policy for agenda preparation has the potential for discrimination. In fact the court specifically noted that although the policy had never been applied to any measure, "the legality of a discriminatory use of the President's discretionary power would be an entirely different case." Opin.

p.4, n.5, Rojas v. Victoria Independent School District, No. V-87-16 (March 29, 1988) (Appendix p.6a,n.5).

Therefore, the district court's determination that the policy change did not require §5 preclearance because it was facially neutral and had not been applied to the disadvantage of the one Mexican American representative on the Board was clearly erroneous.

CONCLUSION

In this case probable jurisdiction should be noted and the case set for oral argument.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ, and WENCESLAO GUTIERREZ, JR.,	§	
Plaintiffs,	§	
V.	§	CIVIL ACTION NO. V-87-16
VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, VICTORIA INDEPENDENT SCHOOL DISTRICT; and VAL HUVAR, County Clerk, County of Victoria,	§	
Defendants.	§	

Before GEE, Circuit Judge, and KAZEN and HEAD, District Judges. GEE, Circuit Judge:

OPINION

Plaintiffs complain of a school board policy governing the procedure for placing issues on its meeting agenda, asserting that its adoption by the board constituted a change in procedure affecting voting so as to require preclearance by the Attorney General of the United States under Section 5 of the Voting Rights Act. The relevant facts are not disputed. Something over a year after the plaintiffs Theresa Gutierrez was elected to the board, the contested policy was adopted. The policy permitted the President of the board, in his discretion, to require the consent of two members for placement of a given item on the board's meeting agenda.[1] Mrs. Gutierrez contends that the

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[1] An earlier proposed version, ultimately replaced by the version in question, would have required two members' consent in every instance. Earlier still, at the time of Gutierrez' election, the request of one member sufficed.

policy diminishes the powers of her position after the fact of her election, she being the sole representative of the Hispanic community on the seven-member board.[2]

The central question debated by the parties is whether the policy change is one "affecting voting" so as to require the Attorney General's clearance. To be sure, it clearly lies beyond the actual election process itself and beyond those actions listed by the Attorney General in the example given at CFR §51.13. [3] Ordinary, routine legislative modification of the duties or authority of elected officials have been held to be probably beyond the reach of section 5, "even given its broadest interpretation." Hardy v. Wallace, 603 F.Supp. 174,

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[2]She is one of five trustees elected from single-member districts, two others being elected at-large.

[3]These include such matters as changes in voters qualifications, in election procedures, and in candidates' eligibility.

179 (N.D. Ala., W.D. 1985). Whatever the farthest reach of the Act might be, we are convinced that the policy before us does not come within its scope. Its effect on the powers of the elected trustees was at most miniscule.

As the plaintiffs' brief correctly notes:

> Under Texas law, a Board of Trustees of a school district constitutes a body corporate and has the exclusive power to manage and govern the school district. §23.26, Tex. Ed. Code. The authority of Board members exists only in context of the Board functioning as a body in an official meeting. No individual board member may exercise authority with respect to the operation of schools or services of school employees by virtue of his status as a Board member. Toyah I.S.D. v. Pecos-Barstow I.S.D., 466 S.W. 2d 377, 380 (Tex.Civ.App.-San Antonio, 1971, no writ); Buchele v. Woods, 528 S.W. 2d 95 (Tex.Civ.App.-Tyler, 1975, no writ).

Thus it necessarily follows that, because the only powers exercised by the board are exercised as a body, only a significant alteration in parliamentary procedure could affect the manner in which it comes to its collective decisions. Standard parliamentary

procedure requires a second to bring any matter before such a body for discussion, and the "new" procedure complained of does no more than permit the board presiding officer, in his discretion, to require a second before entering the issue on the agenda to begin with. Thus, at most, the effect of the challenged change is to advance the time at which a second becomes requisite to drawing a matter before the board. Try as we may, we are simply unable to conceive of this as an alteration in procedure of more than de minimis import.[4] It seems plain to us that if Mrs. Gutierrez is unable to persuade even one other trustee to join her in placing a matter on the board's agenda, she would have had no better success in procuring a second

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[4]The circumstances that the President need not require a second in every case is somewhat more troubling, but it is amply apparent that, while his failure to do so may sometimes lead to the board's discussing a matter which only one trustee wishes to discuss, it will never lead to the board's taking any action supported by only one of its members.

should she have moved it at a meeting -- let alone in collecting the four votes required to pass it. The measure in no way singles her out for unfavorable procedural treatment -- any other trustee can be required to produce a second to get his matter on the agenda -- and there is no showing that it has ever yet been applied to her disadvantage. [5] As for substance, and procedure aside, she finds herself only one among seven -- compelled to enlist allies on the board if her views are to prevail. That, however, is not a a matter with which the Voting Rights Act concerns itself. Judgment will be for the defendants.

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[5] At the hearing it was conceded that in fact it has yet to be applied to any measure. The legality of a discriminatory use of the President's discretionary power would be an entirely different case. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

/s/
Thomas Gibbs Gee
United States Circuit Judge

/s/
George P. Kazen
United States District Judge

/s/
Hayden W. Head, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ, and WENCESLAO GUTIERREZ, JR.,	§	
Plaintiffs,	§	
V.	§	CIVIL ACTION NO. V-87-16
VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, VICTORIA INDEPENDENT SCHOOL DISTRICT; and VAL HUVAR, County Clerk, County of Victoria,	§	
Defendants.	§	

JUDGMENT

For the reasons detailed in an opinion accompanying this judgment, it is DECLARED and ORDERED that adoption of a policy that, at the president's discretion, approval of two board

members could be required to place an item on the agenda of the Victoria Independent School Board does not constitute a change affecting voting within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. §1972c, requiring preclearance from the United States Department of Justice. This case is therefore DISMISSED at Plaintiffs' cost.

DONE this 29th day of March, 1988.

HONORABLE THOMAS C. GEE

HONORABLE HAYDEN W. HEAD, JR.

HONORABLE GEORGE P. KAZEN

BY: GEORGE P. KAZEN /s/

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ, and WENCESLAO GUTIERREZ, JR.,	§	
Plaintiffs,	§	
V.	§	CIVIL ACTION NO. V-87-16
VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, VICTORIA INDEPENDENT SCHOOL DISTRICT; and VAL HUVAR, County Clerk, County of Victoria,	§	
Defendants.	§	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Alexander M. Rojas, Theresa Gutierrez, Ruben Caraveo, Terri Perez, and Wenceslao Gutierrez, Jr. plaintiffs above

named, hereby appeal to the Supreme Court of the United States from the final order denying Plaintiffs' request for declaratory and injunctive relief against Victoria Independent School District under Section 5 of the Voting Rights Act entered in this action on March 29, 1988.

This appeal is taken pursuant to 42 U.S.C.A §1973c.

DATED: April 26, 1988

Respectfully submitted,

ANTONIA HERNANDEZ
NORMA V. CANTU
JUDITH A. SANDERS-CASTRO
ALBERT H. KAUFFMAN
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(512) 887-7887

/s/
JOSE GARZA
Attorney in charge for
Plaintiff-Intervenors

CERTIFICATE OF SERVICE

I, Jose Garza, do hereby certify that I have mailed a true and correct copy of the foregoing Plaintiff-Intervenors NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on this 27th day of April, 1988 certified return receipt requested to the following Attorneys of Record:

Christopher Lehmann
Attorney Voting Section
Civil Rights Division
U. S. Department of Justice
10th & Constitution Ave., N.W.
Washington, D. C. 20530

M. L. Null, Esq.
P. O. Box 1969
Victoria, TX 77902

Anderson, Smith, Null & Stafer
One O'Connor Plaza
Seventh Floor
Victoria, TX 77901

/s/
JOSE GARZA
Attorney for
Plaintiff-Intervenors

APPENDIX C

TEX. OPEN MEETINGS ACT

Tex. Rev. Civ. Stat. Ann. art. 6252-17,
Sec. 3A(a) (Vernon) (Supp.1988)

Sec.3A (a) Written notice of the date, hour, place, and subject of each meeting held by a governmental body shall be given before the meeting as prescribed by this section. The requirement for notice prescribed by this section does not apply to matters about which specific factual information or a recitation of existing policy is furnished in response to an inquiry made at such meeting, whether such inquiry is made by a member of the general public or by a member of the governmental body. Any deliberation, discussion, or decision with respect to the subject about which inquiry was made shall be limited to a proposal to place such subject on the agenda for a subsequent meeting of such governmental body for which notice has been provided in compliance with this Act.

APPENDIX D

WBR:SSC:YDW:gmn
DJ 166-012-3
R7167

February 27, 1987

M. L. Null, Esq.
Anderson, Smith, Null & Stoter
P. O. Box 1969
Victoria, Texas 77902

Dear Mr. Null:

It has come to our attention that the Victoria Independent School District, Victoria County, Texas, formally has adopted a new procedure that prohibits an individual member of the board from presenting issues for the board's consideration. As we understand board policy prior to November 20, 1986, any member of the board could request that an item be placed on the agenda for board meetings. We are informed that the policy now has been changed to require that "[a]ny two members of the Board of Trustees may request...that an item or items be placed on the agenda for Board Meetings."

In our view, this change in policy would seem to have a significant impact on the nature and character of the representation that voters can expect from their individually elected representative under the newly effective single-member district plan and, thus, that the change involves a "standard, practice, or procedure with respect to voting..." requiring preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. Our records fail to show that this change has been submitted to the United States District

Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the Victoria Independent School District plans to take with respect to this matter. Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgement from the District Court for the District of Columbia, please follow the procedures set forth in Subparts B and C of the Procedures for the Administration of Section 5 (52 Fed. Reg. 493-495). If you have any questions, feel free to call Ms. Debora van der Weijdge (202-724-3182) of our staff. Refer to File No. R7167 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By:

Gerald W. Jones
Chief, Voting Section